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Supreme Court of the United States

OCTOBER TERM, A. D. 1948. 522

No. 522.

JULIUS RANNY RAGAN, PETITIONER,

VS.

MERCHANTS TRANSFER & WAREHOUSE COMPANY, INC., A CORPORATION, RESPONDENT.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF OF RESPONDENT.

DOUGLAS HUDSON,
of Fort Scott, Kansas,
Counsel for Respondent.

HOWARD HUDSON,
DOUGLAS G. HUDSON,
Both of Fort Scott, Kansas.

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CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF OF RESPONDENT.

STATEMENT OF THE CASE.

Julius Ranny Ragan, hereinafter referred to as petitioner, a citizen of Missouri, while operating his automobile on U. S. Highway No. 69, near Louisburg, in the State of

Kansas, on October 1, 1943, collided with a truck owned and then operated by the respondent, Merchants Transfer & Warehouse Company, Inc., a citizen of the State of Kansas (R. 1-2).

A complaint was filed in the District Court of the United States for the District of Kansas, Third Division, by the petitioner as plaintiff, against the respondent, as defendant, on September 4, 1945. This was 27 days before the end of the applicable two year statute of limitations of the State of Kansas (R. 1).

The original summons was issued September 7, 1945, and the return filed September 27, 1945, showed on its face that the attempted service of September 22, 1945, was void. The return showed that the respondent had been served "by delivering a true copy thereof to Clarence M. Trent personally" (R. 4).

No one ever pretended at any time in the proceedings that Clarence M. Trent was then or ever had been an officer, agent or employee of the respondent.

Motion to quash this pretended service was filed October 12, 1945 (R. 5).

On October 30, 1945, a letter was written by attorney for the petitioner to the attorney for respondent enclosing a deposition notice and expressing the wish that respondent's attorney should acknowledge receipt of copy, etc. On October 31, 1945, attorney for respondent replied to this request by letter to attorney for petitioner, in which it was stated that the motion to quash service had been filed and that it was the position of respondent "that it was not in the lawsuit" (R. 20).

On December 28, 1945, two years, two months and 28 days after the collision out of which the petitioner's cause

of action arose, an alias summons was issued and served upon the respondent (R. 6).

On April 19, 1946, the return of service of the original summons was quashed (R. 16).

In respondent's answer, filed May 8, 1946 (R. 17-19), the applicable statutes of limitations of the State of Kansas were pleaded in paragraphs Nos. I, II and III.

A pre-trial conference was had on June 17, 1946, during which attorney for the petitioner stated:

> "I concede—freely concede that if this case was pending in the State Court, if it had been commenced in the State Court and pending in the State Court then the cause action would have been barred but, on the other hand, I say that having been commenced in the Federal Court, the Federal rules apply and that it was commenced so as to toll the running of the Kansas Statute of Limitations in time" (R. 21).

On June 19, 1946, the respondent filed a motion for summary judgment, "* * * for the reason that there is no genuine issue as to any material fact in relation to the applicability of the statute of limitations to the plaintiff's complaint, and this defendant is entitled to a judgment as a matter of law" (R. 21).

On June 27, 1946, the petitioner moved to strike paragraphs I, II and III of respondent's answer, in which the applicable Kansas statutes of limitations were pleaded, for the reason as stated, "* * * said paragraphs constitute no defense to plaintiff's complaint" (R. 21).

On October 18, 1946, the District Court sustained petitioner's motion to strike the defense of the statutes of limitations and overruled respondent's motion for summary judgment (R. 22).

Upon trial had to a jury a verdict was rendered in favor of the petitioner for $13,425.00 (R. 29).

Motion for new trial was filed November 25, 1947, again presenting the statutes of limitations of the State of Kansas as a proper defense (R. 30).

The motion was overruled (R. 32).

Upon appeal to the Circuit Court of Appeals of the Tenth Circuit, on November 9, 1948, the Kansas statutes of limitations were held to have been applicable. The judgment of the District Court was reversed and the cause remanded with directions to sustain the respondent's motion for summary judgment (R. 45).

The case is now before this court upon certiorari granted.

SUMMARY OF ARGUMENT.

Since the petitioner conceded in the trial court and reiterates that concession at page 6 of his brief herein, "that if this case was pending in the state court * * * then the cause of action would have been barred * * *," we might well close at this point by citation of *Guaranty Trust Company of New York* v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, 160 A. L. R. 1231.

ARGUMENT.

> "Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of R. Telegraphers* v. *Railway Exp. Agency*, 321 U. S. 342, 349, 88 L. Ed. 788, 792; 64 S. Ct. 582.

We quote the language from this recent decision of this court as expressive of the underlying explanation and basis for statutes of limitations.

It is the *notice* to the adversary to be given within the time prescribed by statute which calls upon him to assemble his evidence, recall the memories of those having knowledge of the facts, and take the depositions of the witnesses who may be ailing or soon to be absent from the forum.

The petitioner's entire brief seems to be based upon the fallacy that a statute of limitations must necessarily be attached to the commencement of an action.

There are many limitations which are attached to notices, claims and demands of various and sundry kinds, as described in the statutes. The Federal and state laws confirm the statement. In Kansas a claim for workmen's compensation is barred by a statute of limitations unless a written claim is delivered to the employer personally or by registered mail within 120 days after the accident.

Sec. 44-520a, 1947 Supp. A suit against a municipal corporation in the State of Kansas can only be maintained in accordance with the provisions of Sec. 12-105, G. S. Kan., 1935, which reads as follows:

> "No action shall be maintained by any person or corporation against any city on account of injury to person or property unless the person or corporation injured shall within three months thereafter and prior to the bringing of the suit file with the city clerk a written statement, giving the time and place of the happening of the accident or injury received and the circumstances relating thereto. * * *"

A municipal corporation in the State of Kansas in the discharge of its proprietary functions is subject to suit for injury to person or property. There is no special statute permitting suits against municipal corporations in those functions. Such suits lie in the State of Kansas under the common law.

In other words, municipal corporations are subject to suit for such injuries to the same extent and under the same law as individuals and private corporations.

However, the legislature has prescribed that no such action shall be maintained against the city unless the notice shall have been given within three months after the alleged accident or injury. Can such an action be brought in the Federal Court if commenced within the period of the general two year limitations without having given the notice?

The original Kansas Code of Civil Procedure was enacted on October 31, 1868, and followed in large measure a similar code of the State of Ohio. The original Code of Civil Procedure adopted in 1868 was with minor changes reenacted in 1909 and appears as Chapter 182 of the Session Laws of Kansas of 1909. Article 3 of the Code of Civil

Procedure adopted in 1909 was entitled, "Time of Commencing Civil Actions," and contained as Section 19 the identical section which appeared as Section 20 in the code adopted in 1868.

In 1923 Revised Statutes were enacted. These Revised Statutes were prepared under authority from the 1921 legislature for "revision, compilation and editing of the General Statutes of Kansas." Chapter 207, Kansas Session Laws of 1921.

The Code of Civil Procedure as it existed from 1868 until 1909 contained Article 3, entitled "Time of Commencing Civil Actions," and contained thirteen sections numbered 13 to 25, inclusive, which appear in the General Statutes of Kansas of 1901, which we are abstracting in part but quoting verbatim where important to the question involved, in this case, as follows, viz.:

Section 13 provides that the article shall not apply to actions commenced.

Section 14 provides that any right of action previously barred is not revived.

Section 15: "Civil actions can only be commenced within the periods prescribed in this article, after the cause of action shall have accrued; but where in special cases a different limitation is prescribed by statute, the action shall be governed by such limitation."

Section 16 relates to real property.

Section 17 provides for extension of limitations as to real property for persons under legal disability.

Section 18: "Civil actions other than for the recovery of real property can only be brought within the following periods after the cause of action shall have accrued, and not afterwards: * * *

Third. Within two years: * * * an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated; * * *."

Section 19 provides for extension of limitations for persons under legal disability relating to causes of action other than relating to real property.

Section 20: "An action shall be deemed commenced *within the meaning of this article*, as to each defendant, at the date of the summons which is served on him, or on a co-defendant who is a joint contractor, or otherwise united in interest with him. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to the commencement thereof within the meaning of this article when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days" (Italics ours).

Section 21 provides that period of limitation does not run while a person be out of the state or has concealed himself.

Section 22 provides that no action can be maintained in this state where the cause of action has been barred by lapse of time between non-residents in another state.

Section 23 provides that if an action fails otherwise than upon the merits a new action may be brought within one year if the time limit shall have expired.

Section 24 provides the period of limitation as effective in a case founded on contract from the time when part payment shall have been made or written acknowledgment delivered.

Section 25 provides when a right of action is barred it shall be unavailable either as a cause of action or ground of defense.

In the revision of 1923 former Article 3 of the 1909 code, headed "Time of Commencing Civil Actions" was changed to read "Commencement and Limitation of Actions." Two sections which had previously been a part of Article 6 of the Code of 1909, being Sections 58 and 59 were inserted as two introductory Sections of Article 3 of the Code of Civil Procedure as reenacted in the Revised Statutes of 1923.

We have recited the history of these enactments so that the court may fully realize and appreciate that from 1868 until 1923 Article 3 of the Code of Civil Procedure, of which present Sec. 60-308, G. S. Kan., 1935, was a part, related solely and only to the "Time of Commencing Civil Actions"; that is to say, the statutes of limitations.

There was no intention in the 1923 revision by the addition of the introductory two paragraphs of Article 3 to change in any way the law as it had been declared by the Kansas courts in relation to the applicability of Sec. 60-308, G. S. Kan., 1935, solely and only as a statute of limitations.

The two introductory sections to Article 3 of Chapter 60 (the Code of Civil Procedure of Kansas) in the 1923 revision were transferred from Article 6 of the code as it had existed since 1868. Article 6 of the 1868 code and of the code adopted in 1909 was entitled in 1868 as "Commencement of a Civil Action" and in 1909 as "The Commencement of Civil Actions."

It is, therefore, very plain that the language now appearing as Section 60-308 historically and by judicial construction has application only to the statutes of limitations and has no function whatsoever in the Kansas statutes ex-

cept to prescribe the time when legal notice by summons shall be given to a defendant to assemble his evidence and prepare to defend his rights.

Sec. 60-301, the now opening section of Art. 3 of G. S. Kan., 1935, which was transported in the 1923 revision of Kansas Statutes from Article 6 of the then Code of Civil Procedure, reads as follows:

> "A civil action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon."

Sec. 60-306, G. S. Kan., 1935, which is now in effect, is identical with Section 18 of the 1868 code, and reads as follows:

> "Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:
>
> * * * * * * *
>
> "Third. Within two years: An action for trespass upon real property; an action for taking, detaining or injuring personal property, including actions for the specific recovery of personal property; an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud.
>
> * * * * * * *"

Sec. 60-308, G. S. Kan., 1935, is identical with original Section 20 of the 1868 Code of Civil Procedure, and reads as follows:

> "An action shall be deemed commenced within the meaning of this article, as to each defendant, at

> the date of the summons which is served on him, or on a codefendant who is a joint contractor, or otherwise united in interest with him. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to the commencement thereof within the meaning of this article when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days."

At this juncture, we may suggest that Sec. 60-301, G. S. Kan., 1935, is analogous to Rule 3 of the Federal Rules of Civil Procedure, as indicated in the opinion of Judge Huxman (R. 36-44).

The decisions of the Supreme Court of Kansas cited by Judge Huxman (R. 43) amply sustain the proposition that if the case had been pending in the Kansas courts, the bar of the statute of limitations would have fallen.

The real point involved is whether or not *Guaranty Trust Company of New York* v. *York* means what it says. In that case the following language appears:

> "The nub of the policy that underlies *Erie R. Co.* v. *Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to substantially different result."

Following the decision of this court in the York case, we find the following language in *Angel* v. *Bullington*, 330 U. S. 183, 91 L. Ed. 832, Headnotes 10, 11 and 12:

> "It is suggested that the North Carolina Supreme Court construed the North Carolina statute to close only the North Carolina State courts but not the federal court sitting in North Carolina. In the first place,

the North Carolina Supreme Court said no such thing. It construed the statute expressive of State policy and spoke only of the jurisdiction of the State courts because it was concerned only with the State courts. Secondly, it is most incongruous to attribute to the legislature and judiciary of North Carolina the imposition of a restriction against all its citizens from suing for a deficiency judgment, while impliedly authorizing citizens of other States to secure such deficiency judgments against North Carolinians. Thirdly, a North Carolina statute, upheld by the highest court of North Carolina, is of course expressive of North Carolina policy. The essence of diversity jurisdiction is that a federal court enforces State law and State policy. If North Carolina has authoritatively announced that deficiency judgments cannot be secured within its borders, it contradicts the presuppositions of diversity jurisdiction for a federal court in that State to give such a deficiency judgment. North Carolina would hardly allow defeat of a State-wide policy through occasional suits in a federal court. What is more important, diversity jurisdiction must follow State law and policy. A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld. Availability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens.

"Cases like *David Lupton's Sons Co.* v. *Automobile Club*, 225 U. S. 489, 56 L. Ed. 1177, 32 S. Ct. 711, Ann. Cas. 1914A, 699, are obsolete insofar as they are based on a view of diversity jurisdiction which came to an end with *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487. That decision drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts or were barred by defenses controlling in the State courts. Compare *Suydam* v. *Broadnax*, 14 Pet. (U. S.) 67, 75, 10 L. Ed.

357, 361. Of course, where resort is had to a federal court not on grounds of diversity of citizenship but because a federal right is claimed, the limitations upon the courts of a State do not control a federal court sitting in the State. *Holmberg* v. *Armbrecht*, 327 U. S. 392, 90 L. Ed. 743, 66 S. Ct. 582, 162 A. L. R. 719."

In *Holmberg* v. *Armbrecht*, 327 U. S. 392, 90 L. Ed. 743, 162 A. L. R. 719, 66 S. Ct. 582, this court said:

"In *Guaranty Trust Co.* v. *York*, *supra*, we ruled that when a State statute bars recovery of a suit in a State court on a State-created right, it likewise bars recovery of such a suit on the equity side of a federal court brought there merely because it was 'between citizens of different states' under Article III, Section 2 of the Constitution. The amenability of such a federal suit to a State statute of limitation cannot be regarded as a problem in terminology, whereby the practical effect of a statute of limitation would turn on the content which abstract analysis may attribute to 'substance' and 'procedure.' We held, on the contrary, that a statute of limitation is a significant part of the legal rules which determine the outcome of a litigation. As such, it is as significant in enforcing a State-created right by an exclusively equitable remedy as it is in an action at law. But in the York Case we pointed out with almost wearisome reiteration, in reaching this result, that we were there concerned solely with State-created rights. For purposes of diversity suits a Federal court is, in effect 'only another court of the State.' *Guaranty Trust Co.* v. *York*, *supra* (326 U. S. at 108, 89 L. Ed. 2086, 65 S. Ct. 1464, 160 A. L. R. 1231)."

It should be observed here that the commencement of an action, as provided by Sec. 60-301, G. S. Kan., 1935, and Rule 3 of the Federal Rules of Civil Procedure, has significance in other respects than as a statute of limitations. An attachment or other provisional remedy may not be invoked until an action has been commenced. In a suit in-

volving title to real property *lis pendens* does not attach until an action has been commenced. These are the incidents of the commencement of an action which are determined by Sec. 60-301, G. S. Kan., 1935, and Rule 3 of the Federal Rules of Civil Procedure.

This view of the Kansas statute is described in *Bannister* v. *Carroll*, 43 Kan. 64, 22 Pac. 1012, cited in the footnote of Judge Huxman's opinion at page 43 of the record.

In "Recent Developments in Federal Practice and Procedure" by Erner Ilsen, published by West Publishing Company, 1947 Revised Edition of "Federal Rules of Civil Procedure with Approved Amendments," the case of *Krisor* v. *Watts*, 61 F. Supp. 845 (D. C. E. D. Wisc., 1945), was criticised in the following language:

> "Since in this case the requirement of notice for service within the period of limitations was an integral part of the Wisconsin statute of limitations it would seem that this holding is incorrect. In diversity of citizenship cases the federal courts under *Erie R. Co.* v. *Tompkins* and *Guaranty Trust Co. of N. Y.* v. *York* must follow the statute and in so doing they should not be permitted to refuse to adopt a portion of it. The state statute should be applied *in toto*." p. 321.

The footnote supporting the criticism reads as follows:

> "Cf. Charles E. Clark, A. B. A. Proceedings of the Cleveland Institute on Federal Rules (1938) 203: 'If there were a state statute of limitations which covered the question so thoroughly, which said, for example, that an action shall be barred unless summons is served within six years, I don't think that this rule (Rule 3) would have any effect at all, because it doesn't cover the same ground.'"

The opinion in *Quinette* v. *Pullman Co.*, (C. C. A. 8) 229 Fed. 333, mentions and quotes from the previous de-

cisions of the Supreme Court of the United States upon the question in the following language:

"It is elementary that the federal courts ordinarily are bound by the decisions of the Supreme Court of a state as to the interpretation and construction of a state statute. The cases in general upon this question are too numerous to cite, but reference is made to all the authorities cited in the Encyclopedia of the U. S. Reports, Vol. 4, p. 1066 *et seq.*, and Vol. 12, p. 434, but reference will be had to some of the cases arising under the statute of limitations:

"'Sec. 721. The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.' Revised Statutes of the United States.

"In *Bauserman* v. *Blunt*, 147 U. S. 647, 652, 13 S. Ct. 466, 468 (37 L. Ed. 316), it is said:

"'No laws of the several states have been more steadfastly or more often recognized by this court, from the beginning, as rules of decision in the courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the Legislature of a state, and as construed by its highest court' (Citing many decisions of the Supreme Court of the United States).

"In *Metcalf* v. *Watertown*, 153 U. S. 671, 673, 14 S. Ct. 947, 948 (38 L. Ed. 861), it is said:

"'And from the beginning this court has recognized statutes of limitations of actions, real and personal, as enacted by the Legislature of a state, and as construed by its highest court, as rules of decision in the courts of the United States.'

"In *Patton* v. *Easton*, 1 Wheat. 476, 482, 4 L. Ed. 139, and again in *Powell* v. *Harman*, 2 Pet. 241, 7 L.

Ed. 411, the Supreme Court construed a Tennessee statute of limitations of real actions in accordance with the decisions of the Supreme Court of that state; yet in *Green* v. *Neal*, 6 Pet. 291, 8 L. Ed. 402, a judgment of the Circuit Court of the United States which had followed those cases was reversed because of a more recent decision of the state Supreme Court establishing the opposite construction, and in *Leffingwell* v. *Warren*, 2 Black. 599, 603, 17 L. Ed. 261, the Supreme Court said:

> " 'The courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statutes of limitations of the several states, and give them the same construction and effect which are given by the local tribunals. They are a rule of decision under the thirty-fourth section of the Judiciary Act of 1789. The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. * * * If the highest judicial tribunal of a state adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications.' "

The above mentioned opinion is followed with quotations from other opinions of the Supreme Court of the United States, and makes this further comment:

> "No case has been found where the Supreme Court has under any circumstances authorized a departure from this rule as applied to questions arising under the statute of limitations" (p. 337).

The opinion in *Guaranty Trust Company of New York* v. *York* has been cited and followed perhaps as frequently as any opinion of this court during the period which has since passed.

In *Lachman* v. *Pennsylvania Greyhound Lines*, (C. C. A. 4) 160 F. 2d 496, 499, we find the following:

> "The line between substance and procedure is not so clearly marked as to be free from doubt in all cases, and the decisions have been influenced by the desire to effectuate the spirit of the doctrine of *Erie R. Co.* v. *Tompkins* so as to secure uniformity in the results to be obtained in the state courts and in the federal courts in diversity cases in each state. This is especially desirable when the remedial law of the state is so closely associated and incorporated with its substantive law as to be necessary in order to maintain and validate the latter. *Precourt* v. *Driscoll*, 85 N. H. 280, 157 Atl. 525, 78 A. L. R. 874. Thus it has been held that the federal courts must follow the law of the state as to the burden of proof in certain classes of cases. *Cities Service Co.* v. *Dunlap*, 308 U. S. 208, 60 S. Ct. 201, 84 L. Ed. 196; *Palmer* v. *Hoffman*, 318 U. S. 109, 117, 63 S. Ct. 477, 87 L. Ed. 645, 144 A. L. R. 719; and as to conflict of laws *Griffin* v. *McCoach*, 313 U. S. 498, 61 S. Ct. 1023, 85 L. Ed. 1481, 134 A. L. R. 1462; *Klaxson Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477; and as to state statutes of limitation in equity cases, *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, 160 A. L. R. 1231."

In *Sullivan* v. *Title Guarantee & Trust Co.*, (C. C. A. 2), 167 F. 2d 393, 395; *Guaranty Trust Company of New York* v. *York*, was cited and declared authority for the statement that:

> "As we have been often advised, a federal court in a diversity suit 'should adjudicate controversies as if it were only another state court.'"

In *Ladd* v. *Brickley*, (C. C. A. 5) 158 F. 2d 212, 219, we find:

> "The lawsuits begun by the Trustee were started in 1943. It is obvious that the action will be barred unless it can be brought under the concealment exception to the running of the statute. It is also clear now that the plaintiff will have no advantage on this aspect of his case in the federal court over what he has in the state court. Since these suits were begun the Supreme Court has decided the important case of *Guaranty Trust Co. of New York* v. *York*, 1945, 326 U. S. 99, 65 S. Ct. 1464, 90 L. Ed. 2079, 160 A. L. R. 1231, which is conclusive authority for the statement just made."

Bergeron v. *Mansour*, (C. C. A. 1) 152 F. 2d 27, 28, reads as follows:

> "State statutes of limitations, whether regarded as having 'procedural' or 'substantive' effect, are binding on the federal courts, sitting in equity or at law, where the rights pursued in the federal courts are granted by the state. *Guaranty Trust Co. of New York* v. *York*, 325 U. S. ....., 65 S. Ct. 1464."

Among the many cases in the District Courts, in which *Guaranty Trust Company of New York* v. *York* has been cited and followed, we are selecting as typical that of *Rose* v. *United States*, (D. C. E. D., New York) 73 Fed. Supp. 759, 763, in which Judge Kennedy said:

> "I suggest that the decision in *Guaranty Trust Company* v. *York, supra*, expresses a federal policy (326 U. S., at p. 112, 65 S. Ct., at p. 1471, 89 L. Ed. 2079, 160 A. L. R. 1231): The operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law.' "

This case, it should be remembered, arose because Julius Ranny Ragan, the petitioner, a citizen of the State of Missouri (R. 1), at a time when he was driving an automobile through the State of Kansas collided with the truck

of the defendant, Merchants Transfer & Warehouse Company, Inc., a citizen of the State of Kansas, upon U. S. Highway No. 69, near Louisburg, in the State of Kansas (R. 2). Solely and only upon the ground of diversity of citizenship, Julius Ranny Ragan chose the United States District Court for the District of Kansas, Third Division as the forum for his lawsuit.

In *Dunlap* v. *McFarland*, 25 Kan. 488, the opinion was written by Judge Valentine. At that time the Supreme Court of Kansas was composed of Hon. Albert H. Horton, Chief Justice, Hon. D. M. Valentine and Hon. D. J. Brewer (afterwards one of the Justices of the Supreme Court of the United States).

There, a suit upon a promissory note was commenced on April 16, 1878, by filing a petition, a praecipe and an affidavit for an attachment, and a summons and order of attachment were issued on the same day. The defendant moved to set aside the order of attachment because the defendant was a non-resident of the State and the summons was not and could not have been served upon him. The first publication of summons as against the non-resident defendant was made on April 19, 1878. At that time Section 20 of the Civil Code was identical in language with Sec. 60-308, G. S. Kan., 1935, as quoted in the opinion of the Circuit Court of Appeals by Judge Huxman at the top of page 43 of the record.

Section 190 of the then Civil Code (except for the addition of sub-paragraph "Seventh," which is immaterial in our matter) is identical with Sec. 60-306, G. S. Kan., 1935, which provides for the general periods of limitation, including a limitation of two years upon an action for tort.

Judge Valentine in *Dunlap* v. *McFarland*, said:

> "But it is further claimed by the defendant that the attachment was erroneously issued before any action was commenced, and he refers to Sections 190 and 20 of the Civil Code, in connection with the foregoing facts, to support his claim. Of course an attachment cannot rightfully be issued before the action (of which it is only an incident) is commenced. But we do not think that the attachment in this case was issued before the action was commenced. The action was commenced when the petition and praecipe were filed and when the summons was issued. *Section 20 of the Civil Code has application only to the statute of limitations;* but even that section provides that 'an attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly, and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days.' We do not think that this claim of the defendant is tenable" (Italics ours).

Hence, we have at this early day a declaration that Section 20 of the then Civil Code, now Sec. 60-308, G. S. Kan., 1935, has application only as a part of the statute of limitations.

In the case of *Bannister* v. *Carroll*, 43 Kan. 64, 22 Pac. 1012, an action was commenced on July 15, 1887, by the filing of a petition, an affidavit for publication, praecipe for summons by publication and an affidavit for order of attachment. The attachment was issued and levied on real estate. Summons by publication was made. The first notice appeared in the newspaper issue of July 21, 1887. The court stated the question as follows:

> "The exact question therefore is: Is a case brought against a non-resident, wherein at the time

the petition is filed, an affidavit for publication is also filed, is it necessary that an ordinary summons, such as is served personally on defendant, be issued?"

The court said:

"It will be observed that there are different provisions of the code prescribing the time at which an action is to be deemed commenced. Section 81 provides that for the purpose of *lis pendens*, the action is pending the moment the petition is filed, if a summons be served or the first publication made within sixty days after the filing of the petition; the service of the summons or the first publication, relating back to the filing of the petition. Article 3 of the code treats of the time within which civil actions are to be commenced to avoid the b r of the statute of limitations; and Section 20 of that article provides, that within the meaning of this article, an action shall be deemed commenced at the date of the summons that is personally served or the date of the first publication, if a summons is served or a first publication made within sixty days. If the construction contended for be applied to this section of the code, it is impossible to have an order of attachment against a non-resident defendant; for as to him the action shall be deemed to be commenced at the date of the first publication, and yet that publication must notify him that his real estate has been attached in the action (Code of Civil Procedure, Section 74; *Cohen* v. *Trowbridge*, 6 Kan. 385). It is of the essence of things that an attachment which is an incident of a lawsuit, cannot be had until the suit is commenced. Under this provision, in regard to the time within which an action must be commenced in order to avoid *the bar of the statute of limitations*, the action is not deemed commenced against a non-resident defendant until the date of the first publication, providing that is made within sixty days from the filing of the petition. This first publication must notify the non-resident defendant that his real property has been attached. This con-

struction involves an absurd impossibility, and demonstrates beyond doubt that Section 20, Article 3, has no application except to fix an arbitrary time at which the statutes of limitation cease to run against the claim or demand of the petition. Article 6 of the Code treats of the commencement of a civil action, and prescribes what acts are necessary on the part of the plaintiff, and what duties are to be discharged by the ministerial officers of the court in order to institute an action. Sections 57 and 81 of this article are the only two sections of the code of civil procedure that have a direct bearing on this question, and we have given our construction of these in the first part of this opinion. Section 190 of the code provides that the plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant. If our construction of the other sections is correct, this means that the plaintiff, at the time he files his petition, can have an attachment. In *Dunlap v. McFarland*, an order of attachment was issued at the same time that the summons was issued, both writs issuing at the time the petition was filed. On the same day that the order of attachment was issued, it was levied on certain real estate belonging to the defendant. On the next day both the order of attachment and the summons were returned. The return of the summons was that the defendant was not found. On the same day of the return of these writs, an affidavit for service by publication was filed, and the first publication was made on the third day after the petition was filed. On this state of facts, Mr. Justice Valentine, the other justices concurring, says (we quote from the syllabus of the case):

"'That for the purpose of the attachment the action is to be deemed to have been commenced at the time of the filing of the petition, the praecipe and the affidavit for the order of attachment, and that the order of attachment will not be held to be invalid because issued before any action was commenced.'

"It is also expressly said in the body of the opinion 'that Section 20 of the civil code *has application only to the statute of limitations*,' but even that section provides that—

"'An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly and diligently endeavors to procure a service, but such attempt must be followed by the first publication or service of the summons within sixty days'" (Italics ours).

In *Wester* v. *Long*, 63 Kan. 876, 66 Pac. 1032, certain corn was attached for unpaid rent. Agnew, the debtor, left the country before summons was served, and he was not served in any way. Wester claimed the attached property by purchase and brought replevin against the sheriff, who was holding under the writ of attachment. The contention was made by Wester that since no personal service or service by publication was attempted for more than sixty days after the filing of the petition in the attachment case, the sheriff could not justify his possession of the property.

The court said:

"Section 20 of the civil code (Gen. Stat., 1901, Sec. 4448), relating to attempts to commence actions, has application only to the statute of limitations (*Dunlap* v. *McFarland, Adm'r*, 25 Kan. 488)."

Again, we learn that Sec. 60-308, G. S. Kan., 1935, appearing at the top of page 43 of the record has reference only to the statute of limitations of the State of Kansas.

In *Green* v. *McCracken*, 64 Kan. 330, 67 Pac. 857, the first paragraph of the syllabus by the court reads as follows:

"An action will not be dismissed on motion of a defendant simply because no service of summons of any kind has been made on him within sixty days from the filing of the petition."

Green sued Olson, attached certain stock of groceries belonging to Olson, and disposed of them under the attachment. McCracken, who held a chattel mortgage on the stock of groceries, sued Green and the constable on July 14, 1898. The summons was returned *non est* as to Green. September 17th McCracken filed affidavit for attachment; returned October 15th unexecuted. November 26th plaintiff filed an affidavit for garnishment, some of whom disclosed indebtedness to Green. Green then filed his motion to dismiss because more than sixty days had elapsed since the filing of the petition and no service of summons having been made upon him during the sixty days period. Green, in other words, relied upon Section 60-308 as applicable to any and all pending cases.

The court said:

"First. The first is that growing out of the overruling of Green's motion to dismiss, the claim being made that, inasmuch as no service was obtained upon him before the expiration of sixty days after the filing of the petition, the court was without jurisdiction to proceed further in the case.

"Section 57 of the code of civil procedure (Gen. Stat., 1901, Sec. 4487) provides:

"'A civil action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereon.'

"This case then was properly commenced on the day of the filing of the petition. Successive but unsuccessful attempts were made thereafter to get juris-

diction of the property of the defendant. These attempts were continued until finally they were successful through garnishment proceedings, and thereafter prompt steps were taken to procure service by publication. Neither the section quoted nor any other one requires the petition to be refiled after the expiration of sixty days in cases where service has not been had during that interval. To be sure, the mere filing of the petition without being followed by the service of summons in the time specified would not stay the statute of limitations as provided in section 20 of the code (Gen. Stat., 1901, Sec. 4448). Neither would it amount to a *lis pendens* under section 81 (Gen. Stat., 1901, Sec. 4515). But neither of these questions arises here. The motion of the defendant was to dismiss the action. Plaintiff in error thinks that the case of *Jones* v. *Warnick*, 49 Kan. 63, 30 Pac. 115, is decisive of the question in his favor. We are unable to see the relevancy of this case to the question in hand. We see no error in the action of the trial court in overruling this motion."

This case of *Green* v. *McCracken* plainly discloses that the sixty days period as provided by Section 60-308 is only considered in connection with the statute of limitations. Until the bar of the statute of limitations arises, the case is pending and service may be had at any time without refiling the petition.

In *State* v. *Alexander*, 84 Kan. 393, 114 Pac. 241, we have a case which is squarely in point with the opinion of the Circuit Court of Appeals of the Tenth Circuit in the instant case. The obligation of Thomas was evidenced by a bond and conviction of December 30, 1905. Suit was actually begun on February 18, 1909. The defendant Thomas prevailed in the District Court upon a demurrer which presented the statute of limitations of the State of Kansas. The State of Kansas appealed. The lower court

was affirmed. The court phrased the question upon appeal as follows:

> "It is insisted by the appellee that the cause of action on February 18, 1909, when the first publication was had, was barred by the statute of limitations, and that the amended petition failed to state facts sufficient to constitute a cause of action. His contention as to the first proposition is that the cause of action accrued on December 30, 1905, when Thomas was convicted, and that no action was really begun until February 18, 1909, which was more than three years from the date of conviction. Section 19 of the civil code provides that an action shall be deemed commenced as to each defendant at the date of the summons which is served on him, and, when service by publication is proper, at the date of the first publication; and that an attempt to commence an action shall be deemed equivalent to the commencement thereof, if followed by publication or service within sixty days. But such service or publication must be had before the limitation has run, in order to keep the cause of action alive (*Dunlap* v. *McFarland, Adm'r*, 25 Kan. 488; *Insurance Co.* v. *Stoffels*, 48 Kan. 205; *Wester* v. *Long*, 63 Kan. 876; *Green* v. *McCracken*, 64 Kan. 330)."

The court in effect adhered to its previous decisions that the service of summons or first publication must be had within the sixty day period to avoid the bar of the statute of limitations.

Section 19 of the Civil Code, as mentioned in *State* v. *Alexander* is identical with Sec. 60-308, G. S. Kan., 1935.

In *Brock* v. *Francis*, 89 Kan. 463, 131 Pac. 1179, the tort out of which the action arose occurred on May 11, 1904. The applicable statute in Kansas was two years. Petition was filed May 9, 1906, two days before the bar of the statute. Summons was issued and served May 11th, answer day being June 8th. On June 7th defendant filed

motion to set aside service, which on July 7th was confessed. July 7th praecipe for alias summons was filed, another on August 29th, and another on October 1st. Alias summons issued October 1st was served October 10th. October 29th, motion to set aside service was filed, which was overruled May 4, 1907. The defendant answered and pleaded the statute of limitations.

The court in its opinion cited the previous cases relating to the statute of limitations, and said:

> "No exception to the quashing of the original was taken, and of course none could have been taken, for the motion was confessed. The defendant cites Section 19 of the Civil Code, especially the clause:
>
> "'An attempt to commence an action shall be deemed equivalent to the commencement thereof within the meaning of this article when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days.'
>
> "This section was said at an early day to have application only to the statute of limitations (*Dunlap* v. *McFarland*, 25 Kan. 488, 491)."

The Supreme Court upheld the plea of the statute of limitations as interposed by the defendant and remanded the case "with directions to render judgment for the defendant."

This case of *Brock* v. *Francis*, involving a tort action, the filing of the petition shortly before the end of the two year period of limitations, the quashing of the first summons and the service of the alias summons after the sixty day period had expired places this case on all fours with the instant case.

The State of Oregon in 1862 adopted as a part of its Code of Civil Procedure a provision relating to the statute of limitations very similar to the Kansas statute. In *Dutro v. Ladd*, 50 Ore. 120, 91 Pac. 459, the action was filed May 7, 1904, which was two days before the expiration of the applicable statute of limitations of six years. On the date of filing, summons was placed in the hands of the sheriff, but was not served until March 9, 1905. Section 51 of the Oregon code reads:

> "Actions at law shall be commenced by filing a complaint with the clerk of the court, and the provisions of Sections 14 and 15 shall only apply to this subject for the purpose of determining whether an action has been commenced within the time limited by the Code."

Sections 14 and 15 of the Oregon Code are described in the opinion, and a very similar argument was made in the Oregon court by the appellant, Dutro, as is being made in this court by the petitioner.

The court said:

> "Section 51 clearly states that Secs. 14 and 15 of B. & C. Comp. can apply only for the purpose of determining whether the action has been commenced within the time prescribed by the Code, and not for any other purpose.
>
> * * * * * * *
>
> "It being admitted the summons was not served, filed, or in any manner attempted to be served or filed, nor publication thereof attempted, until 6 years and 10 months after the cause of action matured, it necessarily follows that the action was not commenced within the time required."

Upon coming into statehood, Oklahoma adopted the Kansas Code of Civil Procedure, including like sections as

those involved in this appeal. In *Cowley-Lanter Lumber Co. v. Doe*, 150 Okla. 150, 300 Pac. 781, Judge Riley, afterward a Chief Justice of the Supreme Court of Oklahoma, in a very exhaustive opinion reviewed the Kansas cases which were cited by Judge Huxman in his opinion. In the Cowley-Lanter Lumber Company case the applicable statute was three years. The cause of action accrued April 23, 1924. On March 21, 1927, the petition was filed in the District Court of Tulsa County, and summons was issued on that date, which was served upon the defendant on March 23, 1927, and return filed March 24, 1927. On May 28, 1927, plaintiff confessed the motion to quash and on the same date caused an alias summons to issue which was served on June 3, 1927. The defendant demurred. The court, among other things, said:

> "Plaintiff first contends that its action was commenced on March 21, 1927, when it filed its petition and praecipe for summons, and the defective summons was issued and afterwards served upon defendant.
>
> "Sec. 231, C. O. S., 1921, provides: 'A civil action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereon.'
>
> "And in *Montgomery* v. *Hogan et al.*, 76 Okla. 243, 185 Pac. 81, it was held: 'In general, a civil action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereon.'
>
> "For the purpose of imparting notice, a cause is pending from the time the petition is filed, but notice thereby given is of no avail unless summons be served or the first publication made within 60 days after the filing of the petition. Sec. 260, C. O. S., 1921.
>
> "With reference to the statute of limitation, still another rule applies.
>
> "Sec. 187, C. O. S., 1921, provides: 'An action shall be deemed commenced, within the meaning of

this article, as to each defendant, at the date of the summons which is served on him, or on a co-defendant, who is a joint contractor or otherwise united in interest with him. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication of service of the summons within sixty days.'

"These sections were all adopted from the state of Kansas, and the latter section has been construed in that state a number of times. In *German Ins. Co.* v. *Wright*, 6 Kan. App. 611, 49 Pac. 704, it was held: 'Where an attempt is made to commence an action on January 29, 1891, by filing a petition in the district court, and causing the issuance of a summons thereon, the service of which is afterwards set aside, and where an alias summons is issued on February 12, and properly served February 14, 1891, held that, under paragraph 4097 of the General Statutes of 1889, the action will be deemed to have been commenced on said January 29th.' This upon the ground that actual service was had within the sixty days.

"In *Ins. Co.* v. *Stoffels*, 48 Kan. 205, 29 Pac. 479, where a summons and service thereof were set aside, and no new service was had within the sixty days, and in the meantime the statute of limitation had run against plaintiff's cause of action, the action was held to have been commenced too late. Therefore, plaintiff's action would have been commenced in time had service been had within 60 days after the filing of the petition. This section has been held to define the time of commencement of an action with relation to the statute of limitation, and is expressly limited to that statute, in *Kelly-Goodfellow Shoe Co.* v. *Todd*, 5 Okla. 360, 49 Pac. 53.

"It will thus be seen that for certain purposes there are three different times or periods when action may be deemed to have been commenced: (1) Generally under section 231, *supra*, when the petition is filed and a summons is caused to be issued; (2) under section 260, for the purpose of imparting notice of the pendency of the action, so as to prevent third persons from acquiring an interest in the subject-matter of the action, when the petition is filed, provided summons be served or the first publication be made within 60 days thereafter; and (3) with reference to the running of the statute of limitation, when the summons is served on each defendant, as of the date of the summons which is served on him, or on a codefendant, who is a joint contractor or otherwise united in interest with him; provided that an attempt to commence the action is equivalent to the commencement thereof, if the party faithfully, properly, and diligently endeavors to procure service, and actually follows the attempt by procuring service, or making the first publication within 60 days thereafter.

"If this be done, the action is commenced within time (provided service is thereafter had within sixty days). *Blakeney* v. *Francis*, 105 Okla. 11, 231 Pac. 464.

"In the instant case, this section was not complied with. The petition was filed and an attempt to obtain service was made, but failed. Service was not actually had until 73 days thereafter, and in the meantime, April 23, 1927, the bar of the statute became complete. In *Blakeney* v. *Francis*, 105 Okla. 11, 231 Pac. 464, 465, it was said: 'This statute was adopted by us from the state of Kansas, and the same statute is found in the Ohio Code of Civil Procedure, and both of those states, in construing the 60 days' limitation therein provided, hold the same runs from the date of the attempted service, rather than from the date when the court determines the original or attempted service defective.'

"The 60 days began to run from the date of the attempted service, and not from the date when plaintiff confessed that the service was defective.

* * * * * * *

"Here plaintiff's attention was called to the defective service by the motion to quash filed before bar of the statute had become complete, and long before the expiration of the 60 days allowed to obtain proper service. Plaintiff could have then confessed the motion and had alias summons issued and properly served in time. It failed to do so, but chose to wait until after the expiration of the 60 days and then confessed the motion, which was equivalent to admitting that no service was had on the original summons. It was plaintiff's own fault that the 60 days expired before service of summons was had.

* * * * * * *

"As pointed out herein, the action was not commenced in due time, in that no service of summons was had within the period of limitation, as extended by the 60-day provision of section 187, *supra*."

The analogy between the Cowley-Lanter Lumber Company case and the instant case is apparent.

The petitioner, Ragan, had 60 days from and after September 22, 1945, within which to sue out an alias summons and obtain valid service. This carried to November 21, 1945. The petitioner must have known from the Marshal's return filed September 27, 1945, that no valid service upon the respondent corporation had been made (R. 4). This invalidity was called to the petitioner's attention by motion to quash filed October 12, 1945 (R. 5). On November 1, 1945, the petitioner's attorney was reminded by letter from respondent's attorney that the motion to quash had been filed, and that it was the position of respondent that it was not in the

lawsuit (R. 20). There yet remained 20 days within which service could have been had after this final letter. Notwithstanding all of this, petitioner waited until December 28, 1945, to cause alias summons to be issued and served. This was one month and seven days after the cause of action had been finally barred by the statute of limitations of Kansas.

The petitioner suggests that the adoption of the Federal Rules of Civil Procedure by this court and the approval by the inaction of the Congress constituted a recognition of Rule 3 in connection with statutes of limitations. We think this contention wholly untenable.

Note 4 of the Advisory Committee (R. 24) suggested the question and reflected upon what the answer of this court might be. The Committee suggested that the provision of Rule 4 (a) "will reduce the chances of such a question arising" (R. 24).

Judge Mellott of the United States District Court placed his decision in large measure upon the opinion in *Isaaks* v. *Jeffers*, (C. C. A. 10) 144 F. 2d 26, 28.

Judge Huxman, who wrote the opinion in the Circuit Court of Appeals in the instant case and who also had written the opinion in *Isaaks* v. *Jeffers, supra,* found no difficulty in reconciling the two cases (R. 44).

The distinction is that New Mexico attaches its statute of limitations solely to the commencement of an action.

If the non-citizen is to be given no advantages in diversity cases in the federal courts over those enjoyed in the state courts, the opinion of the Circuit Court of Appeals in the instant case should be affirmed.

If a non-citizen can by merely filing a suit in the United States District Court in Kansas extend for years

the period limited for the enforcement of his cause of action, he will have effectively circumvented the statute of limitations of the State.

In the instant case the original summons was served upon Trent, a complete stranger to the respondent corporation. It happened that Trent's attorney called the matter to the attention of attorneys for the respondent. In many such cases that would not occur.

Under petitioner's theory the case would have continued indefinitely in the Federal Court, and perhaps years later an alias summons could issue and the defendant required to answer and defend his rights. A plaintiff might very well under these circumstances let his case slumber on the docket until an appropriate time when the defendant's witnesses were gone and their memories dulled by the passage of time.

The Kansas citizen has a right under the Kansas law to know that if he is not sued within two years in a tort action and is not served with a summons in two years and 60 days, no cause of action can be maintained against him.

We fail to see how the case of *Walton* v. *United States*, 73 F. 2d 15 (C. C. A. 8, 1934), mentioned on page 14 of petitioner's brief, give petitioner any comfort. That opinion quotes from the South Dakota laws which are identical with the statutes of Kansas requiring service of the summons within the 60 day period. By analogy, the court ruled that suit against the United States on War Risk insurance was barred, although the complaint was filed within the period of limitations, for the reason that copy of the petition was not thereafter served on the United States District Attorney until the time had elapsed.

The case of *Bomar* v. *Keyes*, 162 F. 2d 136 (C. C. A. 2, 1947), was handed down a year and eleven months after

Guaranty Trust Company of New York v. *York, supra.* No mention was made in *Bomar* v. *Keyes* of the York case, and the 60 day period of service, as provided by the New York statute similar to the Kansas statute, was not involved. The opinion in case of *Bomar* v. *Keyes* shows that the complaint was filed on October 31, 1945, which was within the statutory period and the defendants were served with summons and complaint in December of 1945.

It should be noted also that the jurisdiction of the Federal Court in *Bomar* v. *Keyes* was invoked because of alleged deprivation of a privilege secured by one of the laws of the United States. The jurisdiction did not rest upon diversity of citizenship and the Circuit Court of Appeals realized, therefore, that the case was not governed by the York case.

The opinion of *Gallagher* v. *Carroll,* 27 F. Supp. 568 (D. C. E. D. N. Y., 1943), was decided some six years prior to the court's decision in *Guaranty Trust Company of New York* v. *York.* The Gallagher case does support the contentions of the petitioner herein. Such persuasiveness as the Gallagher opinion may ever have possessed was lost when this court authoritatively declared the applicable rule in the York case.

Krisor v. *Watts,* 61 F. Supp. 845 (D. C. E. D. Wisc., 1945), is also an opinion which supports the petitioner's contentions. That opinion was handed down July 21, 1945, approximately one month after the opinion of this court was rendered in *Guaranty Trust Company of New York* v. *York.* The fact that Judge Duffy in the Krisor case did not mention *Guaranty Trust Company of New York* v. *York* is proof enough that it was not called to his attention at the time of his opinion, which erroneously followed *Gallagher* v. *Carroll, supra.*

The Wisconsin statute of limitations which appears at pages 37 and 38 of the petitioner's petition for writ of certiorari limits an action for tort for personal injuries in Wisconsin to six years. The statute contains the further provision that no such action shall be maintainable unless within two years after the happening of the event a notice given in the manner required for service of summons shall be served upon the person or corporation by whom it is claimed such damage was caused, stating time, place, etc. It further provides that when an action shall be brought and a complaint actually served within two years after the happening of the event, the notice need not be served.

The Wisconsin statute is quite similar to the statute of the State of Kansas, hereinbefore quoted, relative to actions against municipal corporations and providing for notice to be given. We think that the decision in *Krisor* v. *Watts* is unsound. It violates the principle of *Guaranty Trust Company of New York* v. *York*, in that it gives to the non-citizen suing in the Federal Court in diversity cases an advantage which admittedly he would not have possessed if suing in the state courts.

The case of *Sibbach* v. *Wilson*, 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479, relates to an entirely different subject and has nothing whatever to do with the statute of limitations.

Reynolds v. *Needle*, 132 F. 2d 161, 77 U. S. App. D. C. 53, rules that when a complaint is filed after the full period of the statute of limitations has run, the defendant is entitled to a summary judgment. No one would deny the soundness of that statement. It has nothing, however, to do with the instant case.

The statute of limitations was not involved in the case of *Hackner* v. *Guaranty Trust Co.*, 179 F. 2d 95 (C. C. A. 2, 1941); erroneously cited in petitioner's brief on page 39 as 179 F. 2d 95.

CONCLUSION.

We cannot equal the aptness of the paragraph from *Guaranty Trust Company of New York* v. *York*, *supra*, which we now leave with the court in concluding this all too lengthy brief, as follows:

> "Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law. See Morgan, Choice of Law Governing Proof (1944), 58 Harvard L. Rev. 153, 155-158. The fact that under New York law a statute of limitations might be lengthened or shortened, that a security may be foreclosed though the debt be barred, that a barred debt may be used as a set-off, are all matters of local law properly to be respected by federal courts sitting in New York when their incidence comes into play there. Such particular rules of local law, however, do not, in the slightest change the crucial consideration that if a plea of the statute of limitations would bar recovery in a State court, a federal court ought not to afford recovery."

Respectfully submitted,

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